UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SECURITY INSURANCE COMPANY OF HARTFORD, Plaintiff,	:	
-vs-	:	Civ. No. 3:00cv1247 (PCD)
TRUSTMARK INSURANCE COMPANY, Defendant.	:	

RULINGS ON PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO PRODUCE DOCUMENTS AND TO MAKE OTHER DISCOVERY AND DEFENDANT'S CROSS-MOTION TO COMPEL PLAINTIFF TO PRODUCE DOCUMENTS

Plaintiff moves to compel defendant to produce documents and to make other discovery. Defendant moves to compel plaintiff to produce documents. For the reasons set forth herein, plaintiff's motion is denied and defendant's motion is granted.

I. BACKGROUND

Plaintiff is a Connecticut insurance company specializing in reinsurance, or providing insurance to insurers. In 1999, plaintiff entered into a reinsurance agreement ("TIG Agreement") with TIG insurance involving workers' compensation liability. The agreement involved covered losses during a two-year period starting January 1, 1999. On March 11, 1999, plaintiff entered into an agreement ("retrocession agreement") by which defendant would cover 100% of its total liability in the TIG Agreement during the same two-year period. Both agreements did not permit early termination.

During Fall of 1999, defendant notified plaintiff of its intention to terminate the agreement after twelve months based on TIG's failure to comply with the reporting requirements of the TIG Agreement. On September 17, 1999, plaintiff notified TIG that it was in breach of the TIG Agreement and was thus

terminating the agreement as of January 1, 2000. On October 12, 1999, TIG notified plaintiff that the breach had been cured and it rejected plaintiff's proposed termination. On November 16, 1999, defendant again notified plaintiff that TIG was not complying with reporting obligation and that it did not accept TIG's refusal to accept the cancellation.

Plaintiff sought and obtained a modification of the TIG Agreement, which shortened the term of the agreement to one year but included a subsequent run-off period which covered losses incurred by policies issued by TIG during the one year reinsurance period. Defendant accepted premiums paid during the run-off period. On May 9, 2000, defendant notified plaintiff that it was returning premiums paid after December 31, 1999, which it viewed as the expiration of the TIG Agreement. Defendant also characterized the modification with TIG as a "secret" agreement that constituted a material breach of the reinsurance agreement.

II. DISCUSSION

Plaintiff and defendant separately move to compel the production of documents responsive to their discovery requests.

A. Standard

"[T]he scope of discovery under FED. R. CIV. P. 26(b) is very broad, 'encompass[ing] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 114 (2d Cir. 1992) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 2389, 57 L. Ed. 2d 253 (1978)). "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information

need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). The scope of discovery, however, is not without bounds, and limitations are imposed where the discovery is "unreasonably cumulative or duplicative," overly "burdensome . . . [or] expensive" or "the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26(b)(2). An order compelling discovery is rendered after consideration of the arguments of the parties, and such order may be tailored to the circumstances of the case. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996).

The present case was commenced on June 30, 2000. At that time, FED. R. CIV. P. 26(b)(1)(repealed 2000) provided that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." The order of the Supreme Court dated April 17, 2000 provided that "the . . . amendment[] . . . shall take effect on December 1, 2000, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." The present case proceeded for five months under the earlier version of Rule 26. There is evidence in the present motions that the parties conducted significant discovery under this standard. As such, the application of the current, more restrictive standard would not be just. The present motions shall therefore be considered under the earlier version of FED. R. CIV. P. 26(b)(1).

B. Plaintiff's Motion

Plaintiff summarizes the material sought as follows: "(1) documents -- including contracts, slips, premium and loss reports, and correspondence -- relating to reinsurance arrangements produced for

[defendant] by [WEB] . . . and (2) documents relating to efforts by WEB and [defendant] to terminate or cancel other reinsurance arrangements procured for [defendant] by WEB because of allegedly inadequate reporting." Defendant argues that the request is overbroad, unduly burdensome and seeks production of irrelevant material.

Even judging this request under the "subject matter" standard of the former FED. R. CIV. P. 26(b)(1), it is not apparent how defendant's continuing in other reinsurance relationships involving noncompliance with reporting requirements is at all relevant to a determination as to whether plaintiff's compliance with reporting requirements was material to the agreement. Connecticut courts apply the standard set forth in 2 *Restatement (Second) Contracts* § 241 (1981), in determining whether a breach of contract is material.[1] A cursory review of the five-part test reveals that the relevant concerns do not include the conduct of other parties in separate agreements with the non-breaching party. It is beyond question that determinations as to whether a particular term in a given contract is material is fact-specific and case specific. *See Bernstein*, 213 Conn. at 672. It is conceivable, given identical contracts executed between different parties, that a term could be incidental to one contract and essential in another. Plaintiff therefore has not established the relevancy of the discovery sought in determining whether the timeliness of loss reporting was material to the agreement.

---

[1] "In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." *Bernstein v. Nemeyer*, 213 Conn. 665, 672, 570 A.2d 164 (1990)(quoting 2 RESTATEMENT (SECOND) CONTRACTS § 241 (1981)).

Plaintiff's argument that the discovery sought is relevant to defendant's motive for cancelling the agreement is similarly unavailing. In general, motive is irrelevant to a breach of contract claim. *See Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547, 23 S. Ct. 754, 47 L. Ed. 1171 (1903) ("The motive for the breach commonly is immaterial in an action on the contract."); *Koufakis v. Carvel*, 425 F.2d 892, 906 (2d Cir. 1970) ("A breach is a breach; it is of marginal relevance what motivations led to it."); *Weiskopf v. Am. Kennel Club, Inc.*, NO. 00-CV-471, 2002 WL 1303022, at *6 n.1 (E.D.N.Y. June 11, 2002) (motive irrelevant to claim of breach of contract); *Athridge v. Aetna Cas. & Sur. Co.*, No. CIV. A. 96-270, 2001 WL 214212, at *3 (D.D.C. 2001) (same).

Nor is the difference between the former Rule 26 and the present Rule 26 a basis for ordering the production requested. Although the scope of discovery limited to "subject matter"[2] is broader than discovery limited by "claims or defenses," the breadth of discovery permitted under the earlier rule would not accommodate plaintiff's request. "Subject matter" would have to be construed as encompassing any agreement entered into by defendant rather than facts relevant to the particular agreement in dispute but not necessarily the claims or defenses. The construction proposed would reach far beyond the "entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings" identified by the advisory committee. *See* FED. R. CIV. P. 26(b)(1)(advisory committee notes). There is thus no basis for plaintiff's request. Plaintiff's motion to compel is denied.

C. Defendant's Motion

---

[2] "Subject matter" is defined as "[t]he subject, or matter presented for consideration; the thing in dispute; the right which one party claims as against the other, as the right to divorce; of ejectment; to recover money; to have foreclosure. . . . Nature of cause of action, and of relief sought." *See* BLACK'S LAW DICTIONARY 1423 (6th ed. 1990).

Defendant moves for production of material sought for purposes of impeaching the deposition testimony of Edward O'Brien regarding loss reporting requirements. Plaintiff argues that the material sought is irrelevant for purposes of impeachment, applying to a distinct form of reinsurance agreements, *i.e.*, a treaty rather than facultative agreements.

Plaintiff concedes, as it must, that discovery sought for purposes of impeaching witness testimony is permissible. *See Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451 (1947). Its fundamental contention is that with facultative arrangements, the reinsurer retains the right to accept or reject specified risks that the reinsured may attempt to cede to the reinsurer whereas no such right exists in treaty arrangements.[3] Plaintiff argues that O'Brien's testimony was limited to reinsurance treaties and it notified defendant that all documents it possesses relate to facultative arrangements have been produced.

It is not apparent from a reading of O'Brien's testimony that his reference to "treaties" connotes a form of insurance or is instead employed as a synonym for agreement. Plaintiff refused the request for production on the ground that O'Brien "meant" a form of insurance rather than a more generic reference to agreement. It was not plaintiff's place to do so. As such, and as loss reporting is an issue central to the dispute in question, plaintiff shall produce the documents requested in the Second Document Request within defendant's Second Request for Production.

---

[3] This definition is apparently not absolute. In its memorandum in opposition, plaintiff states that treaty reinsurance "is essentially the opposite of facultative agreements." Plaintiff's expert stated that in treaty reinsurance the reinsurer "typically" does not have the option to accept or reject individual risks.

III. CONCLUSION

Plaintiff's motion to compel (Doc. ___) is **denied**. Defendant's motion to compel (Doc. 47) is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, September ___, 2002.

_____

Peter C. Dorsey
United States District Judge